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Evidence--Reported Testimony of Deceased Witness--Substantially Similar Offenses

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EVIDENCE — REPORTED TESTIMONY OF DECEASED WITNESS — SUBSTANTIALLY SIMILAR OFFENSES.—Testimony of the victim of a felonious assault given at a preliminary hearing where the victim was the only witness against the accused was offered in evidence in the subsequent trial for murder. The witness-victim, allegedly as a result of the attack, had dropped dead while on the stand at the preliminary hearing after his examination in chief and cross examination in the presence of the accused. The circuit court sustained a plea in abatement to the indictment as found upon a reporter's transcript, whose correctness was unquestioned, of testimony of the only witness on the issue of identity, since dead. *Held,* that such testimony was admissible for the reason that the issue involved in the second trial was substantially of the same nature as the issue investigated at the preliminary examination. Judgment reversed, indictment reinstated, and case remanded. *State v. Dawson,* 40 S. E. (2d) 306 (W. Va. 1946).

The precise ground of decision is that the law does not permit an examination concerning the legality or the sufficiency of testimony taken before a grand jury upon which an indictment has been based; but the opinion embodies a considered discussion of the admissibility of testimony of the sort here involved. An exception to the hearsay rule admits in a subsequent action the reported testimony of an unavailable witness given at a prior trial or preliminary hearing if the parties and issues are the same. 5 WIGMORE, EVIDENCE (3d ed. 1940) § 1396. While the rule seems simple, the courts have approached the problem of identity with varying degrees of liberality or strictness of interpretation. Generally the testimony of a witness given at a preliminary examination or trial is inadmissible in a subsequent action unless such examination or trial was had in a judicial tribunal, *Putnal v. State,* 56 Fla. 86, 47 So. 864 (1908), and the witness testified under oath, *Hawkins v. United States,* 3 Okla. Cr. 651, 108 Pac. 561 (1910), and the issues and parties were the same as in the case on trial, *Putnal v. State, supra, Somers v. State,* 56 Tex. Cr. 475, 113 S. E. 533 (1908), and unless the witness is now unavailable. Unavailability is said to exist if the witness is dead, *Parks v. Commonwealth,* 109 Va. 807, 63 S. E. 462 (1909), insane, *Hawkins v. United States, supra,* out of the state permanently or for an indefinite period, *People v. Barker,* 144 Cal. 705, 78 Pac. 266 (1904), unable to testify on account of sickness or physical disability, *Hawkins v. Uniteed States, supra,* or if, after due

diligence, he is unable to be found, *People v. Lewandowski,* 143 Cal. 574, 77 Pac. 467 (1904). In criminal cases, there is the additional requirement that the accused must have been present and given an opportunity for cross-examination at the former hearing. *Commonwealth v. Lenousky,* 206 Pa. 277, 55 Atl. 977 (1903); *State v. Stewart,* 85 Kan. 404, 116 Pac. 489 (1911).

In both civil and criminal cases, the orthodox view represented by the older cases, in line with what has been called the majority view, Note (1932) 79 A. L. R. 1402, have admitted prior testimony only if the issues and parties were identical. *Metropolitan Street Ry. v. Gumby,* 99 Fed. 192 (C. C. A. 2d, 1900); *Simmons v. State,* 129 Ala. 41, 29 So. 929 (1900); *Miller v. Gillespie,* 54 W. Va. 450, 46 S. E. 451 (1903). Accordingly, in a case somewhat similar to the principal one, it was held that robbery charged at a preliminary hearing was not sufficiently identical with a subsequent charge of murder, even though the blow inflicted in effecting the robbery caused the subsequent death. *Dukes v. State,* 80 Miss. 353, 31 So. 744 (1902). But a more recent and liberal trend admits former testimony so long as there is substantial identity of issues and parties. *State v. Gaetano,* 96 Conn. 306, 114 Atl. 82 (1921), *State v. Brown,* 331 Mo. 556, 56 S. W. (2d) 405 (1932); *Lyon v. Rhode Island Co.,* 38 R. I. 252, 94 Atl. 893 (1915); 5 WIGMORE, *op. cit. supra* at § 1387. Numerous jurisdictions hold different crimes based on the same act, or different degrees of the same crime, sufficiently identical. *State v. Wilson,* 24 Kan. 138 (1880); *Hart v. State,* 15 Tex. App. 202 (1883) (assault with intent to kill, and murder); *State v. Swiden,* 62 S. D. 208, 252 N. W. 628 (1934) (assault and robbery, and murder); *State v. O'Brien,* 81 Iowa 88, 46 N. W. 752 (1890) (assault and battery, and murder); *Regina v. Beeston,* 6 Cox Cr. Ca. 425 (1854) (wounding with intent to do grievous bodily harm, and murder); *Commonwealth v. Ryhal,* 274 Pa. 40, 118 Atl. 358 (1922) (rape, attempted rape and felonious assault, and murder). But some courts have refused to hold issues growing out of the same act to be substantially the same. *Dukes v. State, supra,* (robbery, and murder); *Stone v. State* 111 Tex. Cr. 547, 15 S. W. (2d) 18 (1928) (driving car while intoxicated, and murder); *State v. Kenstler,* 49 S. D. 551, 207 N. W. 535 (1926) (altering brand of another's cow, and larceny of the same cow). Prior to the principal case, it was not clear whether West Virginia had adopted the liberal view. In *Carrico v. West Virginia Central & P. Ry.,* 39 W. Va. 86, 19 S. E.

571 (1894); *Patterson v. New River & P. C. Ry.*, 87 W. Va. 177, 104 S. E. 491 (1920), and *State v. Sauls*, 97 W. Va. 184, 124 S. E. 670 (1924), the subsequent trial was that of the same issue. and no problem of unidentical issues was present. Since the courts, in general, have broadly developed most exceptions to the hearsay rule to allow as much of the evidence as is trustworthy to come before the court and jury in order to get all the facts of the case, it is submitted that the West Virginia court in the principal case has avoided the "narrow and pedantic illiberality" often applied to the problem.

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NEGLIGENCE—*Res Ipsa Loquitur*—EXCLUSIVENESS OF DEFENDANT'S CONTROL OVER RESIDUAL CIRCUMSTANCES AFTER ALL ELEMENTS OF SHARED CONTROL ELIMINATED.—Plaintiff's intestate, a brakeman employed by defendant, was killed when a freight car upon which he was riding was derailed and plaintiff sought damages under the Federal Employers' Liability Act. 35 STAT. 65 (1908), 53 STAT. 1404 (1939), 45 U. S. § 51 (1940). There was evidence that deceased had signalled the engineer to stop, thrown a switch to put the cars on a siding, climbed back upon the car, and signalled the engineer to proceed. Plaintiff was unable to show any evidence of particular acts of negligence. The district court directed a verdict for defendant on the first count alleging negligence of defendant with respect to car, track or roadbed but submitted the second count alleging negligence generally, with no particulars specified to the jury on the theory of *res ipsa loquitur*. Following verdict and judgment for plaintiff, the circuit court of appeals reversed, because defendant did not have exclusive control over all the probable causative factors connected with the injury. *Held,* that the jury could from the circumstances fairly infer negligence of the defendant upon finding that the deceased was free from any negligence that contributed to the derailment. Judgment reversed. *Jesionowski v Boston & Maine R. R.*, 67 S. Ct. 401 (U. S. 1947).

It is generally accepted formula that three essentials for the application of *res ipsa loquitur* are (1) a type of accident which ordinarily does not occur in the absence of negligence (2) caused by an agency or instrumentality within the exclusive control of the defendant and (3) not attributable to any voluntary action or want of care of the person injured. *Sweeney v. Erving*, 228 U. S. 233 (1912); 4 WIGMORE, EVIDENCE (3d ed. 1940) § 2509. The instant